IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 1050 of 2003
with
CRIMINAL MISC.APPLICATION No 1052 of 2003
with
CRIMINAL MISC.APPLICATION No 1164 of 2003
with
CRIMINAL MISC.APPLICATION No 1132 of 2003
with
CRIMINAL MISC.APPLICATION No 1133 of 2003
with
CRIMINAL MISC.APPLICATION No 1134 of 2003
with
CRIMINAL MISC.APPLICATION No 1295 of 2003
with
CRIMINAL MISC.APPLICATION No 1296 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Judge? : YES

1,2 & 5: YES; 3 & 4 NO

MOHAMMED ALI PIRBHAI DODHIA & OTHERS

Versus

STATE OF GUJARAT

Appearance:

MR BP TANNA, MR.SI NANAVATI, MR.ND NANAVATI senior

counsel and MR SAKEEL QURESHI and MR JB PARDIWALA
for Petitioners.
MR ARUN D OZA PUBLIC PROSECUTOR for Respondent.

CORAM : MR.JUSTICE D.H.WAGHELA

Date of decision: 25/03/2003

C.A.V. JUDGEMENT

1. Rule. Learned Public Prosecutor, Mr.Arun D. Oza, waived service for the respondent-State.

2. These applications for regular bail under section 439 of the Code of Criminal Procedure are filed by the members of the board of directors and some of the persons in the management of the bank on whose behalf the F.I.R. dated 23.10.2000 was filed and which was registered as C.R. No.I-64 of 2002 in D.C.B. Police Station, Surat City. That F.I.R. alleged against 18 persons named therein the offences punishable under sections 408, 409, 420, 467, 471, read with sections 34, 114 and 120-B of the Indian Penal Code ('the I.P.C.' for short) and the relevant provisions of the Gujarat Co-operative Societies Act. Out of them, accused Nos.17 and 18 have been released on bail by the Sessions Court as being civil engineer and advocate, and that part of the order is under challenge in this Court. Accused Nos.13 to 16 are borrowers, loans to whom led the complainant-bank into such financial mess that thousands and thousands of depositors and shareholders of the bank had to see the cessation of the bank's normal operations.

3. Broad outlines of the allegations made against the accused persons are such that granting of huge loans to accused Nos.13 to 16 in complete disregard of banking regulations and guidelines of the Reserve Bank of India practically amounted to conspiracy to loot the bank and the acts of commission and omission revealed criminal breach of trust by office-bearers and officers of the bank. One group of borrowers to whom not more than 5.80 crores of rupees could have been advanced in accordance with the R.B.I. guidelines, even under the best of circumstances, was given away more than 39 crores of rupees even without proper security and verification of documents and jeopardising the liquidity of the bank. Such transactions in favour of the borrowers, who are accused Nos.13 to 16 or their companies, are alleged to have been entered into and carried out consciously, irregularly and illegally by the officers and

office-bearers of the bank who could not have been unaware of the consequences. Not only that, but such officers and directors are alleged to have participated in passing of the necessary resolutions for disbursing the amounts even without the necessary formalities being followed and banking regulations being observed.

4. It would be apposite to refer to the brief prelude to these proceedings since all the applicants had firstly approached the Sessions Court either for anticipatory or regular bail and those applications were, after days of hearing, disposed by an exhaustively elaborate judgment running into 72 pages. Thereafter, the applicants had approached this Court with similar applications and, by the order dated 7.2.2003, most of the applicants were granted conditional anticipatory bail without entering into the merits in the wake of a voluntary assurance given and an undertaking on affidavit filed by the main borrower to assure that a total sum of Rs.55,18,52,724.83 ps. would be paid into the bank in three installments ending on 31st March, 2003. That written undertaking on affidavit was not honoured and complied by the main borrower, namely, Mr.C.R.Patil (accused No.14), and thereafter his regular bail application along with the bail application of accused No.16 was rejected as withdrawn. The other accused persons, including the present applicants, were granted anticipatory or interim bail in view of the arrangement arrived at for the limited purpose and without reference to the merits of the prima facie case of involvement of the petitioners in the serious offences alleged against them. Now, since the main borrower has defaulted in discharging his obligation voluntarily undertaken by him, these applications were argued and pressed on merits on several grounds inviting a reasoned order.

5. It was argued on behalf of the petitioners that the F.I.R. did not disclose any offence and none of the ingredients of various sections including sections 409, 471 or 120-B of the I.P.C. were disclosed since, in the transactions of purely civil nature, the bank had received deposits from the depositors and lent money after proper evaluation of the securities, legal opinion of an advocate and regular documentation. Amplifying this submission, it was submitted that the relationship between the depositors and the bank did not involve any trust, but it was the relationship of a creditor and a debtor and, if any irregularities were committed in regular business of lending money, there were civil remedies which were, in fact, taken and no penal provision could be invoked. Relying upon the judgment in

SAT NARAIN v. STATE OF PUNJAB [1974 Cri.L.J. 232], it was submitted that the money deposited by members or depositors could be utilized by the bank as its own and the depositor-members could get the amount back after certain period along with interest and that cannot be called "entrustment" within the meaning of section 405 of the I.P.C. K.P.MENON v. N. PUNITHAVATHI MANIAN [1987 (1) Crimes 891] was relied upon to submit that trade of a banker is to receive money, and use as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own. The banker, when he receives money from a customer, does not hold the money in a fiduciary capacity. What really happens is that money is not deposited with, when moneys were received by the banker either under a savings account or current account or fixed deposit account, but lent to the banker. In the judgment of the Bombay High Court in PRAVINCHANDRA DWARKADAS DALAL v. BHOGILAL KAMALSHI MEHTA [Cr.L.R. (Mah.) 1982 page 200], while quashing a complaint found to be vexatious, it was observed that if any irregularity or illegality was committed by the board of directors, the concerned authorities had enough jurisdiction to take appropriate action under the provisions of the Maharashtra Co-operative Societies Act, 1960 including that of supersession and removal of any member thereof. The judgment in STATE v. TIRATH DAS [AIR 1954 Allahabad 583] was relied upon to submit that the one underlying idea in section 405 of the I.P.C. is that the property which is the subject-matter of entrustment, or in respect of which dominion is passed over to the accused, does not, even for the time being, become the property of the accused which he could use for his own purposes. The section does not cover the case of a loan or of an advance of money when the borrower or the depositee intends to use or utilize that money, for the time being, till he is in possession of it, although he may have to return an equivalent amount later on to the person making the advance with or without interest. In the facts of that case, the directions as to how the money advanced was to be utilized were held to be not applicable to the property which was entrusted but were held to be applicable to its equivalent. It was pertinently observed that breach of the directions must be done not because the person is forced by circumstances beyond his control to act in violation of the directions but because he dishonestly or, in other words, with the intention of causing wrongful gain to one person or wrongful loss to another person, violates those directions. Reliance was placed upon the judgment in QUEEN EMPRESS v, MOSS [16 All 88 (N)], wherein it is observed by the Division

Bench of the Allahabad High Court that the offence of criminal breach of trust was committed 'by the directors' qua moneys of the bank over which they had dominion, and not 'by the bank' qua the moneys which had been deposited with them by the depositors. Relying upon the Full Bench judgment of he Supreme Court in SHANTI PRASAD JAIN v. DIRECTOR OF ENFORCEMENT, FOREIGN EXCHANGE REGULATION ACT [AIR 1962 SC 1764], the following observations made in an altogether different context were emphasised:-

> "37. Now the law is well settled that when moneys are deposited in a bank, the relationship that is constituted between the banker and the customer is one of debtor and creditor and not trustee and beneficiary. The banker is entitled to use the monies without being called upon to account for such user, his only liability being to return the amount in accordance with the terms agreed between him and the customer. and it makes no difference in the jural relationship whether the deposits were made by the customer himself or by some other persons, provided the customer accepts them. There might be special arrangement under which a banker might be constituted a trustee, but apart from such an arrangement, his position qua banker is that of a debtor, and not trustee. The law was stated in those terms in the old and well-known decision of the House of Lords in FOLEY v. HILL (1848) 2 HLC 29: 9 ER 1002, and that has never been questioned."

The judgment of the Supreme Court in VELJI RAGHAVJI PATEL v. STATE OF MAHARASHTRA [AIR 1965 SC 1433] was relied upon for the proposition that, in order to establish "entrustment of dominion" over property to an accused person, the mere existence of that person's dominion over property is not enough, but it must be further shown that his dominion was the result of entrustment.

6. The other contentions on behalf of the petitioners were that the case of the prosecution was based mainly on the documentary evidence which is in possession of the complainant-bank, which is presently under an administrator and the petitioners were not likely to tamper with the evidence. It was also submitted that the petitioners were having no criminal record and they were likely to be available at the time of trial if they were released on bail on conditions suitable for the purpose. Some of the petitioners were

stated to be wealthy professionals or businessmen having their reputation even otherwise than as directors of the bank and no purpose would be served by keeping them in jail before trial which may take a very long time. Relying upon the judgment of the Supreme Court in SANDEEP JAIN v. NATIONAL CAPITAL TERRITORY OF DELHI [2000 Cri.L.J. 807], it was submitted that when offences alleged against the accused were under sections 420 and 406 of the I.P.C., bail would normally be granted particularly when the Court has not even come to the conclusion that the allegations made in the F.I.R. were true. The facts of that case were, however, basically different and it was doubtful whether the case was to be chargesheeted by the police. It was also submitted that some of the office-bearers of the bank, who were accused of serious offences, were in fact striving for earlier recovery of the loans and could contribute in revival of the bank. As for some of the applicants, the factum of advanced age and indifferent health as also completion of investigation against them were pressed as grounds for being released on bail. And, in case of the applicants who were released on interim bail in wake of the aforementioned undertaking of repayment, it was submitted that they had already undergone pre-trial imprisonment for a period of two to three months, they had not violated any of the conditions of the interim bail and were bound to be available at the time of trial even as the investigation is also completed as against them.

7. It was also argued on behalf of the petitioners that the collapse of the complainant bank was not brought about by loan transactions and irregular advances to accused Nos.13 to 16, but it was due to the loss of faith of the people in the co-operative banks in general on account of closure of one after another co-operative bank as also due to the general recession, earthquake and communal riots in Gujarat. It was sought to be canvassed that even as huge loans running into more than 30 crores were sanctioned on 31st March, 2001 to a single group of borrowers, the bank was in a sound financial condition and the amounts of loans could be recovered from the borrowers' properties which were of much higher value. It was submitted that it was on account of politically motivated persecution of the main borrower that the transactions were painted as a scam. These arguments, however, could not cover or explain the gross irregularities in the matter of granting huge loans to several borrowers as alleged in the F.I.R.

8. The learned Public Prosecutor appearing for the State drew a grim picture of the pathetic plight of about

85,000 depositors and members of the complainant bank whose hard-earned moneys deposited with the bank for the rainy day or for a slightly higher interest were lost for the present. Vehemently opposing the applications, it was submitted that even as a detailed investigation was being carried on by the investigating agency, release on bail of the accused persons would necessarily have a deleterious effect on the moral fibre of the society even as one after the other co-operative banks, by scam after scam with cascading effects, were perceived to be royal road to riches in next to no time. In the context of the facts of the present case, it was shown from the papers of incomplete investigation that the board of directors and the officers of the bank had consciously and by written resolutions granted loans after loans to even defaulting borrowers and that too of such huge amounts and in such flagrant violation of the banking regulations that the complicity and dishonesty of the officers and office-bearers of the bank could, prima facie, be presumed. He submitted that even the reserve funds of the bank and the gratuity funds of the staff were also given away by way of excessive loan to only one party and the same properties were accepted as security for a second loan in the facts of this case. Thus, a grim picture of systematic siphoning of funds of the bank was drawn by the learned Public Prosecutor to submit that the acts of omission and commission of the accused persons literally amounted to robbing thousands of poor and middle-class persons of their hard-earned moneys and allowing such accused persons to lead their normal life and carry on their other business activities would shake the confidence of the people.

9. It was apparent from bare reading of the F.I.R. that the board of directors and the officers of the bank were in control of the funds of the bank and it was, prima facie, disposed and dealt with in a way that no prudent banker would do even in absence of clear guidelines of the Reserve Bank of India and other banking regulations. The result has been a special audit, closure of the bank's operations and loss of crores of rupees for the bank at least for the present. The F.I.R. lodged after audit of transactions of the complainant bank clearly alleges, with details of the modus operandi, deception, breach of trust and forgery in the matter of granting huge loans to accused Nos.13 to 16. The minimum requirement of securing the debt by proper documentation have not only been over-looked but, by over-writing the figures, even larger loans than applied for were sanctioned, temporary advances to the tune of about 11 crores of rupees were given and bank guarantees to the

tune of 9.36 crores of rupees were also provided for the benefit of a particular group of borrowers comprising of accused Nos.13 to 16. The details of such transactions are revealed in the F.I.R. and elaborately discussed by the learned Sessions Judge while rejecting the applications for bail of the petitioners. No reasons are made out to differ from the prima facie findings recorded by the learned Sessions Judge and it would not be proper to indulge into the exercise of discerning the ingredients of particular offences under particular sections at this stage of incomplete investigation. However, it can be observed that whether the banker held the moneys of the depositors in fiduciary capacity or not, they owed a duty to the bank itself to secure the advances and maintain liquidity for the survival of the bank. The board of directors in general, had, prima facie, failed in that. It is also prima facie evident that without the concerted effort and co-operation of all the accused persons, systematic siphoning of money would not have been possible. The arguments based upon the status, age and medical record of some of the petitioners were countered by the submissions that if the petitioners were capable of committing the alleged offences during the period of last one or two years only, they cannot escape the consequences only on the plea of old-age or record of sickness. Even otherwise, in cases of all the applicants, except three, no material indicating present sickness or inability was produced. The apprehension of the prosecution that the evidence yet to be collected may be tampered is reasonable. In these facts and circumstances, it would be proper not to exercise judicial discretion in favour of the applicants.

10. As recently held by the Supreme Court in STATE OF MAHARASHTRA v. RITESH [2001 Cr.L.J. 1695], the High Court need not venture into referring the merits of the case for prematurely holding that there was no material on record to show that the respondent was guilty. It is also held by the Supreme Court in RAM PRATAP YADAV v. MITRA SEN YADAV [2001 AIR SCW 4851] that the High Court should keep in mind, while hearing the application for bail, the factum of the prayer having been rejected by the Sessions Court and the reasons therefor expressly set out in the order of the Sessions Court. It is specifically ordained that the order of the High Court, howsoever brief it may be, should make it appear that the High Court while forming opinion on prayer for bail was conscious of the reasons for rejection of prayer for bail as assigned by the Sessions Court. And, it is also recently observed by the Supreme Court in MANSAB ALI v. IRSAN AND ANOTHER [2002 AIR SCW 5391] that since the

jurisdiction to grant bail is discretionary, it is required to be exercised with great care and caution by balancing right of liberty of an individual and interest of society in general. In granting or refusing bail, the Courts are required to indicate, may be very briefly, the reasons for grant or refusal of bail. The jurisdiction has not to be exercised in a casual and cavalier fashion.

11. In the overall facts and circumstances, a prima facie case of involvement of the petitioners in the alleged offences including the offences punishable under sections 409 and 114 of the I.P.C. is made out as discussed in detail in the judgment of the Sessions Court and no reason is made out to differ from those findings recorded by that Court.

12. However, in case of Mr.Mohammed Ali Pirbhai Dodhia, the applicant in Criminal Misc. Application No.1050 of 2003, it is stated on affidavit that he is an old man aged 71 and associated with the complainant bank as a chairman for 38 years. In the year 2000, during the operation of cataract in both his eyes, serious complications had arisen on account of blood pressure shooting up resulting in complete blindness. Although his vision is partially restored, he continued to be a heart patient and has undergone angioplasty twice. He has also suffered cancer in the right thigh on account of which he was facing problems of foot-drop and was unable to squat. Under such circumstances, he needed special care and arrangement in his daily life. He is also stated to have fully co-operated in the investigation. This petitioner is no longer the chairman or in charge of any affairs of the bank and no allegations of his having taken any advantage of his position for himself or his friends and/or relatives are so far made. Therefore, in the peculiar facts and circumstances, particularly to his case, it appears to be just and reasonable to release him on bail on strict conditions.

Similarly, the petitioner in Criminal Misc. Application No.1133 of 2003, namely, Karamali Nazarali Lakhani, is stated to be aged 68 years and suffering from heart-ailment. He had to undergo heart surgery only two or three months ago and, after angioplasty, he has been advised to avoid any physical or mental stress. It is stated that after undergoing bypass surgery he is advised to wear belt on the chest. It would, therefore, be reasonable and proper to allow him limited liberties during the period of his convalescence and old-age.

The petitioner in Criminal Misc. Application

No.1295 of 2003, namely, Ramzanali Abdulabhai Pathharvala, is stated to be aged 66 and suffering from cardiac problems. He is under medical treatment since the year 1999. It appears from the record that after his arrest, complications had arisen during his incarceration and upon reports of the medical officer of the jail, he had been shifted under police escort to the hospital of a specialist doctor. Therefore, for similar personal reasons, he is required to be released on bail on the same conditions.

13. While the aforesaid three cases of three petitioners were pressed on the additional personal ground of medical conditions, the learned Public Prosecutor, relying upon the judgment of the Supreme Court in DIRECTOR OF ENFORCEMENT v. ASHOK KUMAR JAIN [AIR 1998 SC 631], submitted that the need for providing medical care and attention to the petitioners, in view of their past medical history, would be taken care of by the jail authorities. It is observed in that judgment that it is not unusual that persons involving themselves in economic offences, particularly those living in affluent circumstances, are afflicted by conditions of cardiac instability. So the authorities dealing with such persons must adopt adequate measures to prevent deterioration of their health during the period of custodial internment. But, imposition of anticipatory stipulations would amount to interference with the efficient exercise of statutory functions when dealing with economic offences. These observations were, however, made in the context of an application for anticipatory bail while investigation and custodial interrogation were required to be carried out.

14. Accordingly, all the applications of the applicants, except Criminal Misc. Applications Nos.1050 of 2003, 1133 of 2003 and 1295 of 2003, are rejected. Except the two applicants in Criminal Misc. Applications Nos.1295 of 2003 and 1296 of 2003, the other applicants were granted anticipatory bail and after their formal arrest, they have been at large under the interim order dated 13.3.2003 subject to the condition of reporting at the police station. The applicant in Criminal Misc. Applications No.1296 of 2003 was released by an interim order dated 3.3.2003 and upon rejection of his application by this order, he is also required to surrender to the police station concerned. Accordingly, all the applicants, except the three petitioners in Criminal Misc. Applications Nos.1050 of 2003, 1133 of 2003 and 1295 of 2003, shall surrender at the D.C.B. Police Station of Surat City on or before 2.00 p.m. on

28.3.2003.

15. As for the three petitioners in (1) Criminal Misc. Applications Nos.1050 of 2003, (2) 1133 of 2003 and (3) 1295 of 2003, the applicants, namely, (1) Mohammed Ali Pirbhai Dodhia, (2) Karamali Nazarali Lakhani and (3) Ramzanali Abdulabhai Pathharvala, shall be released on bail in connection with C.R. No. I-64 of 2002 registered in D.C.B. Police Station of Surat City on each of them executing a personal bond in the sum of Rs.1,00,000/- (rupees ONE LAKH) with one surety of the like amount each to the satisfaction of the trial court and subject to the common conditions that they shall:

(a) not take undue advantage of their liberty or misuse their liberty;

(b) not act in a manner injurious to the interest of the prosecution;

(c) maintain law and order;

(d) mark their presence before D.C.B. POLICE STATION, SURAT CITY, on the 1st and 15th day of every month any time between 9.00 a.m. and 2.00 p.m.;

(e) not leave the local limits of SURAT District without the prior permission of the Sessions Judge concerned;

(f) furnish addresses of their residence at the time of execution of the bond and shall not change their residence without prior permission of the Sessions Judge concerned;

(g) not enter the premises of any of the branches or offices of Diamond Jubilee Co-operative Bank Ltd., Surat.

(h) surrender the Passport, if any, to the lower court within a week.

If breach of any of the above conditions is committed, the SESSIONS JUDGE concerned will be free to issue warrant or take appropriate action in the matter.

Bail before the lower court having jurisdiction to try the case.

16. Rule is made absolute accordingly in the aforesaid three applications, namely, Misc. Cri. Applications Nos.1050 of 2003, 1133 of 203 and 1295 of 2003, and Rule is discharged in the other applications. Direct Service is permitted.

(D.H.Waghela, J.)
(KMG Thilake)

After pronouncement of the above order, relying on the judgment of the Supreme Court in K.L.VERMA v. STATE reported in 1998 SCC (Cri.) 1031, the learned counsel requested, on behalf of the petitioners whose petitions have been rejected, that the date of surrendering to the police station may be extended to 01st April, 2003 or the order to surrender may be suspended in its operation for a period upto 01st April, 2003. The applications of the petitioners having been exhaustively argued and dealt with and having been rejected after fulfledged hearing by a reasoned order, the request is rejected.

Sd/-
(D.H.Waghela,J.)
(KMG Thilake)